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No. 00-1528

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

FRED KAYNE, *et al.*,

Petitioners,

—v.—

MTC ELECTRONIC TECHNOLOGIES CO., LTD., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT DAIWA SECURITIES AMERICA INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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COUNTER-STATEMENT OF THE QUESTION PRESENTED

Did the Court of Appeals for the Second Circuit err in refusing to issue an extraordinary writ of mandamus directing the Judicial Panel on Multidistrict Litigation to remand immediately a case transferred pursuant to 28 U.S.C. § 1407 when (i) pretrial proceedings in the transferred case are not yet complete, and (ii) pretrial proceedings in other coordinated cases are also ongoing before the transferee court?

RULE 29.6 LISTING

Pursuant to Supreme Court Rule 29.6, Respondent Daiwa Securities America Inc. ("Daiwa") states that it is a wholly-owned subsidiary of Daiwa America Corporation.

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COUNTER-STATEMENT OF THE CASE

Since February 1993, litigation arising from alleged securities fraud at MTC Electronic Technologies Co., Ltd. ("MTC"), including class actions styled *In re MTC* and *Ellis v. Leung*, has been pending in the Eastern District of New York. On January 23, 1995, certain of the petitioners, putative opt-out plaintiffs, commenced *Kayne v. MTC Electronic Technologies Co., Ltd.* ("*Kayne*") – a securities fraud case largely duplicative of the MTC-related class actions already before the New York federal court – in the Central District of California.[1] Petitioners seek recovery against MTC, its former principals Miko and Sit Wa Leung, certain former directors and officers of MTC (the "Individual Defendants"), MTC's former auditor BDO Dunwoody ("BDO"), Daiwa (underwriter of MTC's 1993 public offering of securities) and others. In June 1995, before any proceedings respecting *Kayne* took place in California, the Judicial Panel on Multidistrict Litigation ("JPML") transferred *Kayne* to the Eastern District of New York, pursuant to 28 U.S.C. § 1407, for "coordinated or consolidated pretrial proceedings," in MDL 1059, with other MTC-related cases.

Following the JPML's transfer order, Judge Gleeson and Chief Magistrate Judge Chrein have supervised all of the pretrial proceedings in *Kayne* and the other MTC-related litigation. They have held numerous hearings, ruled on countless substantive and discovery matters, and gained close familiarity with complex factual and legal contentions in coordinated cases involving over 5,000 deposition exhibits, some 150,000 pages of deposition testimony and production of nearly one million pages of documents.

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[1] The remaining petitioners asserted MTC-related claims through amendments to the *Kayne* complaint in 1996 and 1997.

Under the guidance of Judge Gleeson and Magistrate Judge Chrein, *Kayne* and the other MTC-related litigations have reached a highly advanced stage of pretrial proceedings. The parties to *Kayne* have completed fact discovery, exchanged expert reports, and are completing the depositions of expert witnesses. The district court is considering motions for approval of settlements by BDO and third-party defendant HSBC Bank Canada ("HSBC") with petitioners and will be asked to set a briefing schedule for dispositive motions in *Kayne*. The proposed settlements – as to which the settling parties seek bar orders and good faith determinations – were the subject of extensive briefing, an all-day hearing on January 23, 2001, and, on April 24, 2001, a 28-page report and recommendation by Magistrate Judge Chrein.[2] As to the class actions, Judge Gleeson has approved a settlement between the plaintiff classes and certain (but not all) defendants, and entered defaults with respect to claims and cross-claims against the non-settling defendants. The parties' submissions relating to damages against the defaulting parties are now under submission before Magistrate Judge Chrein. Finally, Daiwa and BDO have filed independent actions in the transferee court against The Grande Holdings Limited ("Grande"), MTC's principal shareholder, seeking contribution in connection with *Kayne*. The parties to the *Grande* cases have proceeded with fact discovery and are presently scheduled to complete expert discovery this summer.

Petitioners initially sought remand of *Kayne* in late 1997, before this Court decided *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998). In

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[2] In the event that Judge Gleeson does not approve the proposed settlements, the deposition of BDO's accounting experts and expert discovery with respect to the third-party claims against HSBC may be necessary.

response to the announcement by counsel for the *In re MTC* and *Ellis* classes of an agreement in principle as to a partial settlement with certain (but not all) defendants, Judge Gleeson directed the parties to show cause why *Kayne* should not be remanded to the Central District of California. At a November 7, 1997 hearing, after receiving papers in support of remand from petitioners, Judge Gleeson determined that he would complete the task delegated to him by the JPML. He ruled that, although he was inclined to return *Kayne* to the Central District of California for trial, that case would remain in the Eastern District of New York until "the conclusion of all pretrial proceedings," including expert discovery and dispositive motions.

In October 1998, following a series of adverse rulings relating to (among other things) expert discovery, petitioners moved before Judge Gleeson to stay all further proceedings and consider remand a second time. In support of their application, petitioners pointed to the approval and consummation of the partial class action settlements previously considered by the district court. On June 1, 1999, after full briefing of the relevant issues, Judge Gleeson again declined to suggest remand. Noting the pendency before him of various MTC-related matters other than *Kayne* and the efficiencies from continued pretrial proceedings in New York, Judge Gleeson held that, notwithstanding the class action settlements, *Kayne* was still a "coordinated" case under 28 U.S.C. § 1407(a). (Pet. App. 11).[3]

Just three weeks later, on June 22, 1999, petitioners urged the transferee court to consider remand yet a *third* time, based solely on the settlement of third-party claims in the class actions against Canaccord Capital Corp. and

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[3] "Pet. App." refers to the Appendix to the Petitioners' Brief.

Charles MaLette. In his report recommending denial of that motion, Magistrate Judge Chrein held that the Canaccord settlement provided no basis to upset Judge Gleeson's November 7, 1997 and June 1, 1999 determinations that his role in *Kayne* was not yet complete. The Magistrate Judge's report also found that, given ongoing expert discovery and the pendency of pretrial motions, "Judge Gleeson's familiarity with the issues involved in *In re MTC* continues to counsel against remand." (Pet. App. 8-10). On October 27, 1999, after still another round of briefing on the remand issue, Judge Gleeson overruled petitioners' objections and adopted Magistrate Judge Chrein's report, reiterating his June 1, 1999 ruling. (Pet. App. 6-7).

In March 2000, although unable to identify any change of circumstances warranting departure from Judge Gleeson's October 1999 ruling (or any of his prior refusals to suggest remand of *Kayne*), and despite the fact that coordinated pretrial proceedings were still ongoing, petitioners moved for remand before the JPML. After full briefing and oral argument, the JPML's seven judges unanimously denied petitioners' motion on May 30, 2000. The panel reasoned that Judge Gleeson "has become thoroughly familiar with the issues in this complex docket involving claims asserted against a myriad of defendants arising out of sales of [MTC] securities." (Pet. App. 4). The panel also pointed to the "great progress" made by Judge Gleeson in "shepherd[ing] class settlements with respect to most of the principal defendants . . . as evidence of why Judge Gleeson is in the best position to provide insight as to the future course of *Kayne* and the remaining MDL-1059 proceedings before him." (Pet. App. 4-5). Finally, the JPML noted that Judge Gleeson (and Magistrate Judge Chrein) were unpersuaded on four separate occasions that remand of *Kayne* was appropriate and the panel was likewise unconvinced that remand was

proper in the absence of a suggestion of remand from Judge Gleeson. (Pet. App. 5).

Petitioners then sought an extraordinary writ of mandamus from the Court of Appeals for the Second Circuit, directing the JPML to remand *Kayne* immediately, prior to the completion of coordinated pretrial proceedings. On January 9, 2001, the Court of Appeals denied petitioners' application, holding that they had not "sufficiently demonstrated that the [JPML] clearly abused its discretion or usurped judicial power." (Pet. App. 2). The Court of Appeals decision cited *In re Patenaude*, 210 F.3d 135, 143 (3d Cir.), *cert. denied*, 121 S. Ct. 565 (2000), a recent Third Circuit decision holding that "the fact that all of the proceedings with which [an] individual action was 'coordinated' had already concluded [does not] raise a bar" to continued transferee court jurisdiction over pretrial proceedings under 28 U.S.C. § 1407. (Pet. App. 2).

In an unbroken string of unanimous rulings, *twelve* federal judges have now rejected petitioners' six applications for immediate remand of *Kayne* prior to the completion of coordinated pretrial proceedings. Nevertheless, petitioners now seek a writ of certiorari from this Court.

REASONS FOR DENYING THE WRIT

Petitioners have failed to demonstrate that the Second Circuit's denial of mandamus relief raises any special or important issue amounting to a "compelling reason" for review in this Court. Sup. Ct. Rule 10. Under settled law, the writ of mandamus is reserved for "exceptional case[s]," and will not issue merely to correct an erroneous decision below. *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 382-83 (1953). Thus, in order to obtain mandamus relief in this case, petitioners had to demonstrate that the JPML's refusal to remand *Kayne* immediately amounted to "a clear abuse of discretion" or "a usurpation of [the

judicial] power." *Mallard v. United States District Court*, 490 U.S. 296, 309 (1989) (internal citations omitted). Far from carrying that onerous burden, petitioners failed to demonstrate *any* error in the JPML's determination. Indeed, the JPML *correctly* determined – consistent with 28 U.S.C. § 1407 and entirely harmonious authority from this Court and the Courts of Appeals – that "coordinated" pretrial proceedings are ongoing in *Kayne* and immediate remand is inappropriate.

I. THE JPML CORRECTLY DETERMINED THAT NEITHER 28 U.S.C. § 1407 NOR THIS COURT'S RULING IN *LEXECON* REQUIRES IMMEDIATE REMAND

Petitioners erroneously assert that "coordinated or consolidated pretrial proceedings" with respect to *Kayne* have ended – and 28 U.S.C. § 1407, as interpreted in *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998), requires immediate remand – because "only proceedings specific to [*Kayne*] remain" before the transferee court. (Pet. Br. 9).[4] Their contention lacks either factual or legal support. First, a number of MTC-related actions other than *Kayne* are still before Judge Gleeson. Second, this Court's *Lexecon* ruling, rather than compelling immediate remand, establishes that Judge Gleeson would have authority to *complete* all pretrial proceedings in *Kayne*, even if no other MTC-related litigation remained in the transferee court.

A. *KAYNE* REMAINS COORDINATED BEFORE JUDGE GLEESON WITH OTHER MTC-RELATED MATTERS

Petitioners incorrectly suggest that coordinated proceedings in MDL 1059 have ended because only

[4] "Pet. Br." refers to the Petitioners' Brief.

proceedings specific to *Kayne* remain before Judge Gleeson. In fact, *Kayne* and a number of other, overlapping MTC-related matters are still pending in the transferee court – precluding any showing that the JPML's denial of remand warrants mandamus relief.

Daiwa and BDO are pursuing independent actions in the transferee court against Grande, MTC's principal shareholder, seeking contribution in connection with *Kayne*. On April 9, 2001, the parties deposed the remaining fact witness in the *Grande* actions, and expert discovery is presently scheduled to be completed this summer. Since Grande's potential liability is substantially derivative of MTC's, the issues in those actions overlap significantly with the issues in *Kayne*. Similarly, and making for additional overlap, expert discovery in *Kayne* may be relevant to the *Grande* actions. The *Kayne* plaintiffs' claims for proxy violations (under section 14(a) of the Exchange Act and SEC Rule 14a-9) against MTC and the Individual Defendants also raise issues as to the conduct of Grande in connection with MTC. Moreover, the complaints against Grande both explicitly seek contribution in the event BDO or Daiwa is held liable in damages for any of the proxy violations alleged in *Kayne*. Recognizing the overlap between *Kayne* and the *Grande* actions, the *Kayne* plaintiffs have sought to participate in *Grande* fact discovery and requested documents produced in discovery by Grande.[5]

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[5] The transferee court's discovery rulings further underscore the coordination between *Kayne* and the *Grande* cases. For example, in September 2000, petitioners and HSBC sought the transferee court's permission to attend and question at the depositions of certain Grande executives, scheduled to be held in Singapore during October 2000. At a September 25, 2000 hearing, Magistrate Judge Chrein, denied that request, noting that
(footnote continued)

In addition, Daiwa, the Individual Defendants, BDO, and MTC have asserted cross-claims against Miko and Sit Wa Leung (MTC's former principals) and Alan Leung (a former MTC executive), in connection with *both* the MTC class actions and *Kayne*.[6] Class plaintiffs' claims against the Leungs also remain pending. On motions by class plaintiffs, Daiwa, the Individual Defendants, BDO, MTC and HSBC, Judge Gleeson entered defaults on the class action claims against the Leungs. Magistrate Judge Chrein is now considering the parties' submissions relating to damages against the Leungs so that judgments can be entered upon those defaults.

Finally, *Kayne* itself has been the subject of much recent activity before the transferee court. The parties have completed fact discovery, exchanged expert reports and are completing expert depositions. The transferee court is considering motions for findings of good faith and entry of

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fact discovery in *Kayne* had been closed for nearly three years and that permitting numerous parties to participate in the *Grande* depositions would jeopardize a schedule set months earlier for completion of expert discovery in *Kayne* and fact discovery in *Grande*. Simultaneously, the Magistrate Judge limited the use of testimony by Grande witnesses so as to avoid any potential prejudice to petitioners and other parties to *Kayne* denied the opportunity to examine. The Magistrate Judge's careful balancing of discovery schedules and case management needs in related actions against potential prejudice to the parties in those actions – affirmed by Judge Gleeson – reflects precisely the centralized control characteristic of "coordination" under 28 U.S.C. § 1407.

[6] HSBC likewise has asserted claims against Miko and Sit Wa Leung in connection with the class actions and *Kayne*.

bar orders in connection with proposed settlements between BDO, HSBC and petitioners, and will be asked to set a schedule for dispositive motions. After extensive briefing and an all-day hearing on January 23, 2001, Magistrate Judge Chrein issued his report and recommendation as to the settlement-related motions on April 24, 2001. Those motions likely will be the subject of further litigation before Judge Gleeson.

B. *LEXECON* AND *PATENAUDE* ESTABLISH THAT *KAYNE* WOULD STILL BE A COORDINATED PROCEEDING EVEN IF NO RELATED CASES WERE PENDING

Even if no other MTC-related matters were proceeding in the transferee court, the JPML's refusal to remand *Kayne* immediately would not have violated either section 1407 or the principles enunciated by this Court in *Lexecon*. To the contrary – as the Third Circuit recognized in *In re Patenaude*, 210 F.3d 135 (3d Cir.), *cert. denied*, 121 S. Ct. 565 (2000) – *Lexecon* confirms that *Kayne* would be a coordinated case even if *all* other MTC-related cases had terminated.

In *Lexecon*, plaintiffs sued two law firms, Milberg Weiss Bershad Hynes & Lerach and Cotchett, Illston & Pitre, in the Northern District of Illinois. *Lexecon*, 523 U.S. at 28-29. In June 1993, the JPML transferred *Lexecon* to the District of Arizona, for consolidated or coordinated pretrial proceedings with other litigation relating to Charles Keating, American Continental or Lincoln Savings & Loan. In March 1994, while discovery progressed in the *Lexecon* action, the Arizona court entered final judgment with respect to all of the cases before it, except Lexecon's action against Milberg and Cotchett. In August 1994 and November 1994, Lexecon asked the Arizona court to remand its case against Milberg and Cotchett back to Illinois. The Arizona court refused and required the parties

first to complete pretrial discovery in Arizona and then heard summary judgment motions. In April 1995, the Arizona court granted summary judgment for defendants on all claims against Cotchett (later made final under Fed. R. Civ. P. 54(b)) and all but one of plaintiffs' claims against Milberg, and transferred that remaining claim – a defamation count – to itself for trial pursuant to 28 U.S.C. § 1404(a). *Id.* at 29-31. Following a defense verdict at trial and affirmance in the Ninth Circuit, this Court granted certiorari. Plaintiffs sought a ruling by this Court vacating all district court orders after the conclusion of consolidated pretrial proceedings – including the summary judgment in favor of Cotchett.

Although this Court ultimately concluded that the Arizona district court lacked statutory authority under section 1407 to transfer the defamation claim against Milberg to itself for trial, the Court also found that, notwithstanding the prior termination of all the other Lincoln Savings litigations transferred by the JPML, the Arizona district judge still had authority to conduct pretrial proceedings at the time of the self-transfer motion. Justice Souter noted that "coordinated" pretrial proceedings are not "narrowly limited" to situations where multiple actions are pending simultaneously in the transferee district. Rather, he reasoned, even months after the final settlement of the other Lincoln Savings cases, *Lexecon* was "'coordinated' with the conduct of earlier cases sharing the common core of the Lincoln Savings debacle, if only by being brought before judges in a district where much of the evidence was to be found and overlapping issues had been considered." *Lexecon*, 523 U.S. at 33-34.

Given Justice Souter's conclusion that "coordinated or consolidated" pretrial proceedings had not concluded as of April 1995, the Court further found no error in the Arizona court's grant of summary judgment in favor of Cotchett,

well after the termination of the other Lincoln Savings actions. Justice Souter noted that:

> Although Cotchett's request for an order of dismissal under Rule 54(b) was not granted until after the Arizona court had assigned the case to itself for trial, there is no reason to reconsider that dismissal order. It was perfectly proper as a pretrial order and, for that matter, was merely the formal reflection of the Arizona court's decision on the merits of the claims that had been resolved prior to that court's decision on the § 1404 transfer motion.

Id. at 43 n.6.

The Third Circuit applied *Lexecon's* broad definition of "coordination" under 28 U.S.C. § 1407 in *Patenaude*, a case arising from the JPML's transfer of numerous asbestos-related personal injury actions to the Eastern District of Pennsylvania. A handful of plaintiffs repeatedly moved the transferee court for suggestions of remand, noting that, during the seven years following the JPML transfer order, the only proceedings in their cases had been supplementation of certain discovery responses and unproductive settlement conferences. *Id.* at 138-39. After the transferee court failed to rule on those motions, plaintiffs unsuccessfully moved for remand before the JPML and then sought a writ of mandamus. *Id.* at 138. The Third Circuit noted that *Lexecon* "indicates that the phrase 'coordinated or consolidated' is to be interpreted broadly." The panel went on to find that "a proceeding that relates only to a single individual's case or claim can nonetheless be coordinated" because, as the *Lexecon* Court held, cases may be "coordinated" for purposes of section 1407 "if only by being brought before judges in a district where much of the evidence was to be found and overlapping issues had been considered." *Patenaude*, 210 F.3d at 142-43 (quoting *Lexecon*, 523 U.S. at 33-34). Applying those principles, the Third Circuit rejected plaintiffs' argument "that

'coordinated or consolidated pretrial proceedings' are concluded when the transferee court ceases to conduct proceedings that are common to all." Instead, the court reasoned, "it is not necessary that any one issue be common to all cases, so long as issues 'overlap.'" *Id.* at 143-44. Thus, the court held that settlement conferences in plaintiffs' cases remained "coordinated" with similar proceedings in the other asbestos-related litigation transferred by the JPML, and denied mandamus.

Contrary to petitioners' argument, *Patenaude* in no way conflicts with *Lexecon*. Rather, the Third Circuit's decision was compelled by this Court's holding that a single case transferred by the JPML remained "coordinated" under section 1407(a), despite the prior termination of *all* related cases, because of (1) the transferee court's experience with overlapping issues in other actions arising from a common factual core, and (2) the presence in the transferee district of relevant evidence. *Lexecon*, 523 U.S. at 33-34.

This Court's definition of "coordination" likewise calls for the conclusion that *Kayne* remains "coordinated" before Judge Gleeson regardless of the pendency of other MTC-related litigation. Substantial evidence relating to *Kayne* has been found in the transferee district, particularly given the New York presence of Daiwa and Rogers & Wells (Daiwa's counsel in connection with MTC's 1993 offering of securities), and the substantial production of documents and other discovery there. Further, more than half of the damages sought in *Kayne* are claimed by petitioners who reside in New York, Ohio and Germany – not California – and three New York City petitioners account for more than one third of the supposed damages in *Kayne*. Additionally, litigation relating to MTC has been pending in the Eastern District of New York since 1993. During the intervening seven and one half years, as the JPML recognized, Judge Gleeson and Magistrate Judge Chrein have become "thoroughly familiar with the issues in this complex docket

involving claims asserted against a myriad of defendants arising out of sales of [MTC] securities," including the overwhelmingly overlapping issues between *Kayne* and the class actions. (Pet. App. 4).

Given the consistent holdings in *Lexecon* and *Patenaude*, the JPML's' refusal to order an immediate remand was entirely correct and did not amount to a clear abuse of discretion or usurpation of judicial power. The Second Circuit properly declined to disturb that ruling by issuing a writ of mandamus.

II. THE JPML CORRECTLY CONSIDERED JUDGE GLEESON'S FAMILIARITY WITH THE CASE IN DECLINING TO REMAND PRIOR TO THE COMPLETION OF PRETRIAL PROCEEDINGS

Petitioners offer no authority for their novel argument that the JPML, in ruling on their motion for immediate remand, should have disregarded the familiarity of Judge Gleeson and Magistrate Judge Chrein with the MTC litigations. Not surprisingly, both the facts and the law fully support the conclusion that the transferee court's experience with the MTC litigations counsels strongly against remand before the completion of pretrial proceedings.

Courts and the JPML consistently look to the transferee judge's familiarity with the case in determining whether remand is appropriate under section 1407. *See, e.g., In re Ivy,* 901 F.2d 7, 9 (2d Cir. 1990) (denying mandamus in part because the JPML's order drew support from "real economies in transferring such cases to Judge Weinstein, who has been handling the Agent Orange litigation for several years"); *In re Holiday Magic Sec. & Antitrust Litig.*, 433 F. Supp. 1125, 1126 (J.P.M.L. 1977) (denying motion for immediate remand because the transferee judge "has become thoroughly familiar with the issues in this entire

litigation and is in the best position to determine the future course of [the opt-out case] and the non-settling claims in other actions in the transferee district in relation to each other [and] in relation to the recently affirmed class action settlement"); *In re CBS Color Tube Patent Litig.*, 342 F. Supp. 1403, 1405 (J.P.M.L. 1972).

The reasoning of *Ivy*, *Holiday Magic* and *CBS Color Tube* applies with special force in this case. Judge Gleeson and Magistrate Judge Chrein have developed, over more than six years, intimate familiarity and expertise in the highly complex facts surrounding the MTC litigations. Moreover, *all* of the pretrial proceedings in *Kayne* – including numerous substantive and countless (sometimes weekly) discovery motions – have taken place before the transferee court. Having brought *Kayne* to an advanced stage of pretrial proceedings, the transferee court is the most efficient and appropriate forum to oversee and coordinate the remaining pretrial tasks. Less than two weeks ago, Magistrate Judge Chrein issued his 28-page Report and Recommendation on the motions by BDO, HSBC and petitioners for determinations of good faith settlement, entry of bar orders, injunctions, dismissals and other relief respecting their proposed settlements. Further briefing as to those motions before Judge Gleeson is likely. The parties are completing expert discovery, and Judge Gleeson will be asked to set a briefing schedule for dispositive motions. Immediate remand of *Kayne* would significantly delay the completion of those proceedings while another federal judge learns the background of the MTC cases conducted in the Eastern District of New York since 1993. By contrast, continuing those proceedings before Judge Gleeson will accelerate resolution of the *Kayne* action, narrow the issues faced by the California court after remand and minimize the waste of judicial resources attendant on repetitive efforts.

III. THE *GRANDE* ACTIONS ARE PROPERLY COORDINATED WITH *KAYNE*

Petitioners suggest that the *Grande* actions somehow do not count as "coordinated" with *Kayne* under section 1407 because they (1) lack an "independent jurisdictional basis in the Eastern District of New York," (2) are "alter ego" actions that should not have been filed until after judgment in *Kayne*, and (3) were never formally "transferred" by the JPML. These meritless arguments present no issue worthy of review in this Court.

Petitioner's argument that the *Grande* actions lack any "independent" jurisdictional basis in the transferee court ignores settled law holding that venue is based on the facts existing at the time an action is commenced. *See Minnesota Mining & Mfg. Co. v. Eco Chem, Inc.*, 757 F.2d 1256, 1264 (Fed. Cir. 1985) ("[l]ike jurisdiction, venue 'once properly established . . . [is] unaffected by the change in parties, since it relates to the institution of the suit'") (*citing* 4 Moore's Federal Practice ¶25.05, at 517); *see also, e.g., Flowers Indus., Inc. v. F.T.C.*, 835 F.2d 775, 776 n.1 (11th Cir. 1987) ("venue must be determined based on the facts at the time of filing"). Given that the transferee district was a proper venue for the *Grande* actions when they were commenced, this argument fails.

Although BDO and Daiwa seek contribution from Grande in connection with *Kayne*, the *Grande* actions are separate from *Kayne* and are not simply "alter ego" actions. While the *Grande* actions turn in large part on MTC's role in the frauds alleged by plaintiffs, those actions also raise issues as to Grande's after-the-fact role in MTC's affairs that are distinct from *Kayne*. In any event, there is no reason – and petitioners cite to no authority for the proposition – that "alter ego" claims *must* be filed only after a judgment establishing underlying liability against the initial defendant. BDO's and Daiwa's claims against Grande are free-standing actions that support

"coordination" of pretrial proceedings before the transferee court.[7]

Petitioners' argument that *Kayne* and the *Grande* actions "were never coordinated by JPML order" is a red herring. JPML Rule 7.5(a), logically avoiding needless and duplicative motion practice, provides that "Potential 'tag-along actions' filed in the transferee district require no action on the part of the Panel." The transferee court has ruled that the *Grande* actions are properly consolidated with *In re MTC,* and they are, therefore, coordinated cases under section 1407(a).[8]

IV. JPML RULE 7.6(D) DOES NOT VIOLATE SECTION 1407

Petitioners finally contend that JPML Rule 7.6(d) – providing, in relevant part, that "[t]he Panel is reluctant to

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[7] Petitioners suggest that the transferee court has not treated *Kayne* and the *Grande* actions in coordinated fashion. As we noted above, the record does not support petitioners' contention in that regard. *See* n.4 and accompanying text, *supra.*

[8] Alternatively, petitioners float the erroneous notion that *Lexecon* calls for the conclusion that JPML Rule 7.5(a) is invalid. In *Lexecon*, the Court simply held that, because the JPML lacks statutory authority to transfer cases for trial, the Panel could not by rule authorize a transferee court to transfer an action to itself for that purpose. *Lexecon*, 523 U.S. at 40. But the Panel has authority to transfer "tag-along" actions for pretrial purposes. Given that authority, Rule 7.5(a), permitting "tag-along" cases to be coordinated without formal panel action under appropriate circumstances, falls well within the Panel's authority under 28 U.S.C. § 1407(f) to "prescribe rules for the conduct of its business not inconsistent with Acts of Congress and the Federal Rules of Civil Procedure."

order remand absent a suggestion of remand from the transferee court" – violates Section 1407 because it "gives almost conclusive deference to the transferee judge." (Pet. Br. at 12). As with petitioners' other arguments, this position is factually and legally flawed.

First, the record demonstrates that the JPML in fact exercised independent judgment in ruling on plaintiffs' motion for remand. Prior to ruling on the motion, the JPML received extensive briefing from the parties, accompanied by hundreds of pages of exhibits, and entertained oral argument, at which the judges of the Panel indicated their familiarity with both the record in the case and the relevant case law, including *Lexecon*. Moreover, the opinion denying plaintiffs' motion for remand – although concisely worded – does not state that the JPML simply adopted Judge Gleeson's conclusions without further analysis. Rather, the JPML denied petitioners' motion based on its independent assessment that:

- Judge Gleeson had "become thoroughly familiar with the issues" surrounding the MTC litigations and had "made great progress and . . . shepherded class settlements with respect to most of the principal defendants" (Pet. App. 4);
- Judge Gleeson's accomplishments in managing the MTC litigations constituted "evidence of why [he] is in the best position to provide insight as to the future course of *Kayne* and the remaining MDL-1059 proceedings before him" (Pet. App. 4-5); and
- plaintiffs – apart from their failure to persuade Judge Gleeson that remand was appropriate – "also failed to convince this Panel that it should order remand in the absence of a suggestion of remand from Judge Gleeson." (Pet. App. 5).

Against that backdrop, petitioners can hardly claim that the JPML failed to exercise independent judgment in denying remand.

Moreover, contrary to petitioners' suggestion, Rule 7.6(d) neither effects a delegation of the JPML's remand authority to transferee courts nor requires transferee courts to render advisory opinions. The JPML's rules sensibly provide a structure for considering a transferee court's views as to the appropriateness of remand, but nowhere purport to *require* that transferee judges express such views. Rule 7.6(d) simply reflects a judgment that transferee courts are well-positioned to assess the need for continued coordination of pretrial proceedings, and that deference to a transferee court's views on that subject is appropriate. Thus, in *Patenaude*, the Third Circuit upheld Rule 7.6(d) against the very challenge petitioners would raise here, reasoning: "Deference is not abdication, however, and the presence or absence of a remand recommendation from the transferee judge as a factor in the [JPML's] decision-making process seems to us entirely reasonable." *Patenaude*, 210 F.3d at 146.

Finally, even if the JPML had denied petitioners' motion solely on the basis of Judge Gleeson's prior rulings – which it did not – that fact alone would not support mandamus relief. In order to obtain a writ of mandamus, petitioners would have to establish that the result reached by the JPML, denial of their motion, amounted to a "clear abuse of discretion" or "usurpation of judicial power." Proof that the JPML failed to exercise independent judgment, even if there were any, could not alone substitute for the requisite showing. *See Patenaude*, 210 F.3d at 146. Here, as we demonstrated above, petitioners have failed to identify any error in the JPML's denial of their motion for remand, much less an error sufficiently egregious to warrant mandamus relief. Petitioners' arguments fail.

CONCLUSION

The court below correctly determined – consistent with the prior decisions of this Court and the only other Court of Appeals decision on point – that the JPML's refusal to direct immediate remand of *Kayne*, prior to the completion of pretrial proceedings, was neither a "clear abuse of discretion" nor a "usurpation of judicial power." Accordingly, no compelling reason supports review in this Court, and the petition for a writ of certiorari should be denied.

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Respectfully submitted,

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